

June 28, 2002

**APPLICATION OF LEVEL 3 COMMUNICATIONS, LLC
TO EXPAND ITS CERTIFICATE OF CONVENIENCE
AND NECESSITY TO PROVIDE FACILITIES-BASED
LOCAL EXCHANGE AND INTEREXCHANGE
TELECOMMUNICATIONS SERVICES IN ALL
TENNESSEE SERVICE AREAS**

DOCKET NO.
02-00230

**ORDER APPROVING APPLICATION
OF LEVEL 3 COMMUNICATIONS, L.L.C. TO AMEND
ITS CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

This matter came before the Tennessee Regulatory Authority (the “Authority” or the “TRA”) at a regularly scheduled Authority Conference held on April 30, 2002, upon the Application (the “Application”) of Level 3 Communications, LLC (“Level 3”) to amend its Certificate of Public Convenience and Necessity (“CCN”) to provide telecommunications services on a statewide basis in areas serviced by incumbent local exchange carriers with fewer than 100,000 total access lines in Tennessee. Level 3 was previously granted authority under TRA Docket No. 98-00610 to provide facilities-based local exchange and interexchange services in areas served by incumbent local exchange carriers that have 100,000 or more access lines in Tennessee.¹

¹ See *In Re: Level 3 Communications Application for a Certificate of Convenience and Necessity to Provide Local Exchange*, Docket No. 98-00160, *Order Granting Certificate of Public Convenience and Necessity*, (November 24, 1998). Level 3's Application in that docket was approved with express recognition that the CCN granted under Tenn. Code Ann. § 65-4-201 did not include those "areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state," as provided in Tenn. Code Ann. § 65-4-201(d).

Level 3's Application presents the first request by a competitive local exchange carrier ("CLEC") to enter the territory of an incumbent provider with fewer than 100,000 access lines since the Federal Communications Commission ("FCC") issued its order preempting the TRA's enforcement of Tenn. Code Ann. § 65-4-201(d).²

Tenn. Code Ann. § 65-4-201 sets forth the requirements for approval of an application for a Certificate of Public Convenience and Necessity as follows:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without first having obtained, in like manner, a similar certificate; provided, that this section shall not be construed to require any public utility to obtain a certificate for an extension in or about a municipality or territory where it shall theretofore have lawfully commenced operations, or for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line, or system, and not theretofore receiving service of a like character from another public utility, or for substitute or additional facilities in or to territory already served by it.

(b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the Tennessee regulatory authority a certificate of convenience and necessity for such service or territory; provided, that no telecommunications services provider offering and providing a telecommunications service under the authority of the authority on June 6, 1995, is required to obtain additional authority in order to continue to offer and provide such telecommunications services as it offers and provides as of June 6, 1995.

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a

² In Re: AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Area, FCC 99-100, FCC Memorandum Opinion and Order, (May 27, 1999).

certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

An authority order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a competing telecommunications service provider shall be entered no more than sixty (60) days from the filing of the application.

(d) Subsection (c) is not applicable to areas serviced by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6, 1995.

BACKGROUND

On January 2, 1998, AVR, L.P. d/b/a Hyperion of Tennessee, L.P. ("Hyperion") filed its application, pursuant to Tenn. Code Ann. § 65-4-201(b), requesting that the Authority interpret Section 253(a) of the federal Telecommunications Act of 1996 (the "Act") as a prohibition against the enforcement of Tenn. Code Ann. § 65-4-201(d), to the extent that Tenn. Code Ann. § 65-4-201(d) would prohibit Hyperion from providing competing telecommunications services within the service territory of Tennessee Telephone Company.³ In that proceeding, the record demonstrated that by order of the Tennessee Public Service Commission (the "TPSC"), Hyperion held a CCN to provide telecommunications services as a competing telecommunications provider throughout Tennessee, except in those areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in

³ See *In Re: AVR of Tennessee, L.P. d/b/a Hyperion Telecommunications of Tennessee, L.P., Application for a Certificate of Public Convenience and Necessity to Extend its Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company*, Docket No. 98-00001 (January 2, 1998).

Tennessee. The TPSC's Order, relying upon Tenn. Code Ann. § 65-4-201(d), restricted Hyperion from competing against Tennessee Telephone Company in its protected service area.

In TRA Docket No. 98-00001, Hyperion argued that Tenn. Code Ann. § 65-4-201(d) had been preempted by Congress' enactment 47 U.S.C. § 253(a) and by the FCC's actions in *In re Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling* ("Silver Star")⁴ and *In re the Public Utility Commission et. al. Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995* ("the Texas Preemption Decision").⁵ Hyperion also asserted that while 47 U.S.C. § 253(b) provides limited exception for certain state requirements, any such requirements must be competitively neutral and consistent with 47 U.S.C. § 254. Further, such requirements must be necessary to preserve and advance universal service, protect public safety and welfare, ensure continued quality of telecommunication services and safeguard the rights of consumers. According to Hyperion, the FCC had determined that the requirements of Section 253(b) were not met in Silver Star and the Texas Preemption Decision. Hyperion argued the same conclusion was required in its case because the state provisions protecting incumbents already preempted by the FCC were virtually identical to Tenn. Code Ann. § 65-4-201(d).

The Intervenor⁶ in the case argued that, as a state regulatory agency, the Authority is charged with enforcing the laws of Tennessee, including Tenn. Code Ann. § 65-4-201(d). The Intervenor asserted that 47 U.S.C. § 253(d) envisions that preemption determinations should be

⁴ Memorandum Opinion and Order, FCC 97-336, CCB Pol 97-1 (September 24, 1996).

⁵ Memorandum Opinion and Order, FCC 97-346, CCB Pol 96-13, 96-14, 96-16, and 96-19 (October 1, 1997).

⁶ Tennessee Telephone Company, Concord Telephone Company, Tellico Telephone and Humphreys County Telephone intervened in TRA Docket No. 98-00001. Pursuant to Tenn. R. Civ. P. 24.04, the Authority's Executive Secretary provided notice to the Tennessee Attorney General that the validity of Tenn. Code Ann. § 65-4-201(d) was being questioned in this matter. The Attorney General did not elect to participate, either by written argument or through oral argument.

made on a case by case basis by the FCC, after notice and an opportunity for public comment, and that the FCC had not reviewed the enforceability of Tennessee's statute.

The matter came before the Authority on March 10, 1998. A majority of the Directors voted to deny Hyperion's Application.⁷ The Authority determined that while on its face Section 253(a) of the Act appeared to preempt Tenn. Code Ann. § 65-4-201(d), it was imperative to first evaluate whether § 65-4-201(d) satisfied the requirements of Section 253(b) of the Act.⁸ The Authority concluded that Tenn. Code Ann. § 65-4-201(d) is essential to preserving universal service within Tennessee, protects the public safety and welfare, ensures the continued quality of telecommunications services and safeguards the rights of consumers.⁹ The Authority found that many of the small, independent local exchange companies and telephone cooperatives in Tennessee serve small areas with relatively few customers, and, typically, such small service areas include a few large business customers whose revenues support the provision of affordable service to the companies' residential customers. An incumbent's loss of a large business customer to a CLEC could result in increased residential and small business rates to make up for the incumbent's lost revenue.¹⁰

Relative to the competitive neutrality requirement of 47 U.S.C. § 253(b), the Authority found that Tenn. Code Ann. § 65-4-201(d) is competitively neutral because its restriction on entry into the service areas of small local exchange companies applies to all telecommunications service providers within the State.¹¹ The Authority determined that Sections 253(a) and (b) of the Act must be read together, and such reading demonstrates that Congress clearly intended

⁷ Chairman Lynn Greer did not vote with the majority's position.

⁸ See *Order Denying Hyperion's Application for A Certificate of Public Convenience and Necessity to Extend its Service Territory into Areas Currently Served by Tennessee Telephone Company*, Docket No. 98-00001, p. 8 (April 9, 1998).

⁹ *Id.*

¹⁰ *Id.*, at 8-9.

¹¹ *Id.*, at 9-10.

states to retain the authority to preserve, protect, and promote universal service.¹² Because Tenn. Code Ann. § 65-4-201(d) satisfied the requirements of Section 253(b) of the Act, the Authority determined that Section 253(b) operated as a limitation upon Hyperion's preemptive challenge under Section 253(a). Therefore, the Authority denied Hyperion's application pursuant to Section 253(b) of the Act.¹³

On May 29, 1998, Hyperion filed a Petition with the FCC asking the FCC to preempt the enforcement of Tenn. Code Ann. § 65-4-201(d) as well as the Authority's April 9, 1998 Order denying Hyperion a CCN to provide local exchange service in areas of Tennessee served by the Tennessee Telephone Company. Hyperion also asked the FCC to direct the TRA to grant Hyperion's application for an expanded CCN. Hyperion asserted that the TRA's Order and Tenn. Code Ann. § 65-4-201(d) violated Section 253(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,¹⁴ and fell outside the scope of authority reserved to the states by Section 253(b) of the Act.

On May 27, 1999, the FCC issued an Order granting in part and denying in part Hyperion's Petition. Specifically, the FCC preempted the enforcement of the TRA's Order of April 9, 1998 and Tenn. Code Ann. § 65-4-201(d), but declined to direct the TRA to grant Hyperion's CCN application. The FCC stated that upon a request from Hyperion, the Authority should reconsider Hyperion's application in a manner consistent with the Act and the FCC's Memorandum Opinion and Order.¹⁵ Nevertheless, Hyperion never renewed its request.

¹² *Id.*, at 11.

¹³ *Id.*

¹⁴ 47 U.S.C. § 253(a). Section 253 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.*

¹⁵ *In Re: AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Area*, FCC 99-100, FCC Memorandum Opinion and Order, (May 27, 1999), ¶ 22.

The Authority filed a Petition for Reconsideration of the FCC's Order and Memorandum on June 28, 1999 and a Motion for Stay on July 8, 1999. The Authority sought reconsideration on the grounds that it had found that the requirements of Tenn. Code Ann. § 65-4-201(d) were "necessary to preserve universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."¹⁶ On January 8, 2001, the FCC issued its Order denying the TRA's Petition for Reconsideration and Motion for Stay. By its January 8, 2001 Memorandum Opinion and Order,¹⁷ the FCC has expressly preempted, pursuant to 47 U.S.C. § 253(d), enforcement of Tenn. Code Ann. § 65-4-201(d) pursuant to authority granted it under 47 U.S.C. § 253(d).¹⁸

LEVEL 3'S PETITION TO AMEND CCN

On March 1, 2002, Level 3 filed its Application in compliance with Tenn. Code Ann. § 65-4-201(b), and requested that the TRA amend Level 3's CCN to provide facilities-based local exchange service in all Tennessee service areas subject to 47 U.S.C. § 251(f). In its Application, Level 3 states that it intends to deploy an independent network by either building its own facilities or leasing the facilities of other carriers. For the present time, Level 3 will lease the facilities of third party carriers or, where necessary, purchase facilities from the incumbent local exchange carriers ("ILECs") to support market entry and the exchange of all kinds of traffic between ILEC customers and Level 3 customers. Level 3, in order to preserve its right to

¹⁶ *Tennessee Regulatory Authority's Petition for Reconsideration of Order and Memorandum of Federal Communications Commission*, CC Docket No. 98-92, p. 13 (June 28, 1999).

¹⁷ *In Re: AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, FCC 01-3, CC Docket No. 98-92 (January 8, 2001).

¹⁸ 47 U.S.C. § 253(d), "Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

provide service using the ILECs' unbundled network elements at some further date, has requested that the TRA grant Level 3 statewide full facilities-based authority. Level 3 states in its filing that it will not provide service using unbundled network elements obtained from an ILEC holding a rural exemption or suspension under federal law unless and until it submits a bona fide request¹⁹ for interconnection.

Findings

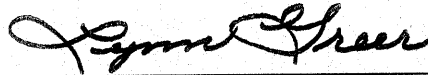
Level 3's Application was made pursuant to and was considered in light of the criteria for granting a CCN as set forth in Tenn. Code Ann. § 65-4-201. Upon review of the record in this docket, the Authority finds that Level 3 has complied with state and federal law requirements for seeking a statewide CCN. Further, Level 3 states that it will submit a bona fide request before entering the territory of an ILEC holding a rural exemption under the 1996 Telecommunications Act.

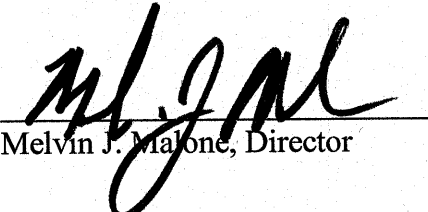
¹⁹ See 47 U.S.C. § 251(f).

IT IS THEREFORE ORDERED THAT:


The Application of Level 3 Communications, LLC to amend its Certificate of Public Convenience and Necessity to provide telecommunications services on a statewide basis in areas served by incumbent local exchange carriers with fewer than 100,000 total access lines in Tennessee, is approved.


Sara Kyle, Chairman


H. Lynn Greer, Jr., Director


Melvin J. Malone, Director

ATTEST:


K. David Waddell, Executive Secretary